STATE OF MICHIGAN

COURT OF APPEALS

WARNER NORCROSS & JUDD, LLP,

Plaintiff-Appellee/Cross-Appellant,

v

POLICE & FIRE RETIREMENT SYSTEMS OF THE CITY OF DETROIT,

Defendant,

and

RDD INVESTMENT CORPORATION,

Defendant-Appellant/Cross-Appellee,

and

RONALD ZAJAC, PC, F. LOGAN DAVIDSON, ROMULUS DEEP DISPOSAL LIMITED PARTNERSHIP, REMUS JOINT VENTURE, ENVIRONMENTAL DISPOSAL SYSTEMS, INC., JAMES MOORE, GARY CHRISTIAN, SETH DOYLE, GEORGE ORZECH, PAUL STEWART, FRANK ENGLISH, ALBERTA TINSLEY-TALABI, JEFFREY BEASLEY, GREGORY BEST, and DEDEAN MILTON,

Defendants.

UNPUBLISHED
June 10, 2014

No. 312779
Wayne Circuit Court
LC No. 09-014899-CK

Before: SERVITTO, P.J., and FORT HOOD and BECKERING, JJ.

PER CURIAM.

RDD Investment Corporation appeals as of right the trial court's entry of a money judgment in plaintiff's favor on plaintiff's claim seeking an attorney's lien for recovery of its attorney fees for services performed pursuant to a contract with defendant, Environmental Disposal Systems, Inc. Plaintiff cross-appeals from the trial court's order dismissing its claims of partnership liability, joint venture liability and violations of the Uniform Fraudulent Transfer Act. We reverse the trial court's grant of summary disposition in favor of plaintiff and against RDD on plaintiff's claim of successor liability and on the claim of attorney's lien and thus vacate the judgment granting an attorney's lien on all of RDD's assets as well as the money judgment entered in plaintiff's favor and against RDD. We remand for entry of summary disposition in favor of RDD on these two claims and affirm the trial court's summary disposition rulings on all other issues.

The disputes in this matter arose over a hazardous waste disposal site and efforts to bring the potentially profitable site into existence ("the project"). Defendant Remus Joint Venture ("Remus") owned a facility for the project and defendant Environmental Disposal Systems ("EDS") was the managing agent of Remus. Defendant Police and Fire Retirement Systems ("PFRS") invested heavily (over $40 million) in the project primarily in the form of loans and, according to plaintiff, exercised extensive control over the project. PFRS held a mortgage on the project's real property and EDS and Remus additionally assigned all of the project's future permits, licenses and approvals to operate the project to PFRS as security for PFRS's loans.

In 1998, Remus and EDS hired plaintiff to address legal issues surrounding the project, which consisted primarily of obtaining and defending the required permits necessary to operate the disposal project. Apparently, the project triggered extensive permitting proceedings and litigation. Plaintiff, Remus and EDS entered into a contingency fee agreement concerning plaintiff's services and all defendants involved in the project were aware of the fee agreement.

Plaintiff contends that it successfully assisted defendants in obtaining and maintaining all of the mandatory permits and defended against numerous actions against defendants concerned with the project. The project successfully opened in 2005 after receiving the necessary permits and licenses. The project never opened at full capacity, however, never operated at a profit, and closed in the fall of the 2006 due to lack of funds and regulatory violations. Plaintiff alleged that there is an outstanding balance of $1,641,970.42 in legal fees and $14,756.42 in costs owed to it under its fee agreement with Remus and EDS.

Plaintiff further alleged that it sent Remus and EDS a letter reminding them of the same in 2006 and that a short time later, PFRS, in collaboration with other defendants, arranged for EDS and Remus to transfer all of their assets in the project to defendant RDD Investment Corporation ("RDD"). RDD is a newly formed, wholly owned subsidiary of PFRS formed for the express purpose of accepting the assets. Plaintiff averred that the purpose of the transfer was to insulate the project from valid creditor claims, such as and including plaintiff's. Plaintiff further asserted that due to regulatory limitations, transfer of the permits and license to RDD effectively terminated them.

Plaintiff asserted that all defendants are obligated to pay it for the work it successfully performed in obtaining the necessary permits for the project. It thus brought a lawsuit against defendants alleging breach of contract against EDS and Remus; partnership liability against

Romulus and PFRS; joint venture liability against Romulus and PFRS; successor liability against RDD; violation of the uniform fraudulent transfer act against EDS, Remus, Romulus, PFRS and RDD; and conspiracy to commit a fraudulent conveyance against all defendants. Plaintiff also claimed an attorney's lien.

Relevant to the instant matter, the trial court granted summary disposition in favor of plaintiff and against RDD on its claim of successor liability, entering judgment on this count in plaintiff's favor in the amount of $1,641,970.42 plus post-judgment interest of $174,102.89. The trial court further granted summary disposition in favor of plaintiff and against RDD on its claim for an attorney lien. The trial court granted plaintiff a lien against all of RDD's assets including all permits, licenses and associated revenues in the amount of its judgment. The trial court dismissed all of plaintiff's remaining claims.

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). A court may grant summary disposition under MCR 2.116(C)(8) if "[t]he opposing party has failed to state a claim on which relief can be granted." A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). When deciding a motion under (C)(8), this Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the nonmoving party. *Dalley v Dykema Gossett*, 287 Mich App 296, 304-305; 788 NW2d 679 (2010). Summary disposition should be granted under subrule (C)(8) only when the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Id*. at 305, quoting *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under (C)(10), a reviewing court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). If the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 362–363.

RDD first contends that plaintiff's complaint seeking an attorney's lien is unenforceable as a matter of law because such liens apply only to fees incurred in the case in which a judgment or fund is obtained. We agree.

There are two types of attorney's liens. A general, retaining, or possessory lien grants the attorney the right to retain possession of property of the client, including money and documents, until the fee for services is paid. *George v Sandor M. Gelman, P.C.*, 201 Mich App 474, 476; 506 NW2d 583 (1993). Plaintiff did not and does not claim entitlement to a retaining lien.

A special or charging lien is "an equitable right to have the fees and costs due for services secured out of the judgment or recovery in a particular suit." *George*, 201 Mich App at 476. The charging lien "creates a lien on a judgment, settlement, or other money recovered as a result

of the attorney's services." *Id.* But the judgment, settlement or other money recovered must result from the attorney's services. *Id.;* see also *Reynolds v Polen*, 222 Mich App 20, 23; 564 NW2d 467 (1997). Attorney charging liens are not recognized by statute but exist in the common law. *George*, 201 Mich App at 477. "Michigan recognizes a common law attorney's lien on a judgment or fund resulting from the attorney's services." *Miller v Detroit Auto Inter–Ins Exch*, 139 Mich App 565, 568; 362 NW2d 837 (1984).

As *Kysor Industrial Corp v D.M. Liquidating Co*, 11 Mich App 438, 446; 161 NW2d 452 (1968), quoting 7 CJS Attorney and Client § 211, p 1142 explains, "[t]he special or charging lien of an attorney is an equitable right to have the fees and costs due to him for services in a suit secured to him out of the judgment or recovery in that particular suit" and "[t]he lien is based on the natural equity that plaintiff should not be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment." Stated another way, the law creates a lien of an attorney upon the judgment or fund resulting from his or her services. *Aetna Cas & Sur Co v Starkey*, 116 Mich App 640, 644; 323 NW2d 325 (1982). "An attorney's lien is . . . a specific encumbrance on a fund or judgment which the client has recovered through the professional services of the attorney." *Id*. at 645.

While plaintiff would encourage a much more expansive interpretation of an attorney's charging lien, the case law is clear. An attorney charging lien only attaches to judgments or funds which are recovered *by the client* through the professional services of the attorney in that particular matter. The specific requirement that a client must recover the funds in order for the attorney lien to attach is readily observable in *Dunn v Bennett*, 303 Mich App 767; __NW2d __ (2013). In that case, the defendant hired the plaintiff attorney to represent him in actions brought against him by the IRS. The defendant had purchased a home from his father and had allegedly leased the property to his mother. The IRS claimed the transfer was made so that the defendant's mother could avoid a federal tax lien and thus sent the defendant a "Notice of Tax Lien," listing defendant as a "nominee or transferee" of his mother. The defendant hired the plaintiff to represent him concerning the IRS lien. The agreement specified an hourly rate and an initial retainer. The plaintiff represented the defendant for over two years in a federal lawsuit suit to remove the "Notice of Federal Tax Lien," ultimately reaching a settlement under which the property was sold. The settlement agreement provided that the IRS would collect $25,110.77 from the proceeds of the sale and the defendant would receive $40,110.77. During the course of the litigation, defendant paid approximately $20,000 for plaintiff's legal services, but refused payment of the remaining balance, an amount totaling $116,361.21. While the trial court found that the defendant breached its contract with plaintiff, it also found that plaintiff did not have a charging lien on the proceeds from the home sale. Citing 93 ALR 667, § 3, the Court stated, "We do not view this as a 'recovery' to which a charging lien may be attached."

Significantly, the introduction to 93 ALR 667 states, ". . . an attorney has what is generally known as a particular, special, or charging lien on the judgment, decree, or award obtained for his client, for his services rendered in procuring it. . . . This right, though called a lien, rests not on possession, as in the case of the class of liens just discussed, but on the equity of an attorney to be paid his fees and disbursements out of the judgment which he has obtained, and is upheld on the theory that his service and skill produced the judgment, and in accordance with the principle which gives a mechanic a lien upon a valuable thing which, by his skill and labor, he has produced . . . ."

Douglas Wicklund, president of EDS signed an acknowledgment of Remus's and plaintiff's fee agreement on behalf of Remus on October 3, 2006. The agreement provided that for plaintiff's service through June 30, 1998, Remus would pay plaintiff not more than $175 per hour for legal service plus a contingent fee of $75 per hour for each hour expended by an attorney. The acknowledgment provided:

> [t]his contingent fee was due and payable upon the completion of the project and the commencement of commercial operations (the "Triggering Event").
>
> ***
>
> The Triggering event occurred in December 2005. Some of those fees incurred since that date have been paid; others remain outstanding. RJV acknowledges that as of August 31, 2006, there is an unpaid fee balance of $414,846.00.
>
> RJV now owes WNJ $1,627,214.00 in fees and $14,756.42 in costs . . . . The facility commenced commercial operations in early 2006, and all conditions for WNJ to earn the contingent fee have been met. EDA agrees with the foregoing description of the fee arrangement and the outstanding amount of the fees.

Plaintiff's client was Remus. Thus any charging lien could attach only to judgments, decrees, or awards obtained on behalf of Remus through plaintiff's legal services. Plaintiff would argue that *anything* obtained for Remus through its legal services is subject to a lien, and specifically argues that the trial court did not err in awarding it an attorney's lien against all of RDD's assets. However, plaintiff has provided no binding Michigan law suggesting that charging liens apply to anything other than money, funds or judgments recovered by the client through suits in which the attorney represented the client. Plaintiff has specifically identified no authority suggesting that an attorney charging lien could attach to personal property that was not directly awarded as recovery in a lawsuit and, more importantly, plaintiff has not established that any specific license or permit obtained by Remus was awarded as recovery by a court in a lawsuit.

Plaintiff directs this Court to *Estate of Clarks ex rel Brisco-Whitter v United States*, 202 F3d 854, 856 (CA 6 2000) as support for its position. The Court, quoting *Goodrich v McDonald*, 112 NY 157; 19 NE 649 (1889), explained the general nature of attorney charging liens as follows:

> [T]he lien, as thus established, is not strictly like any other lien known to the law, because it may exist although the attorney has not and cannot, in any proper senses, have possession of the judgment recovered. It is a peculiar lien, to be enforced by peculiar methods. It was a device invented by the courts for the protection of attorneys against the knavery of their clients, by disabling clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained. The lien was never enforced like other liens. If the fund recovered was in possession or under the control of the court, it would

> not allow the client to obtain it until he had paid his attorney, and in administering the fund it would see that the attorney was protected. If the thing recovered was in a judgment, and notice of the attorney's claim had been given, the court would not allow the judgment to be paid to the prejudice of the attorney.

What this Court gleans from *Estate of Clarks ex rel Brisco-Whitter* is no more than the general premise that attorney's liens are unique and that the purpose of an attorney's lien is to preclude an attorney's client from receiving the fruits of his recovery without paying his attorney for the services by which the recovery was obtained. In this case, even if personal property were subject to attachment by an attorney's lien in the manner suggested by plaintiff, attaching an attorney lien to the personal property licenses and permits RDD now has, due to PFRS's recovery of the same from EDS and Remus as security for its debt, does nothing to advance the purpose of the attorney's lien. It does not preclude the attorney's client (Remus) from receiving the fruits of their recovery without paying plaintiff for the services by which the recovery was obtained.

Moreover, in order for the attorney's lien to attach to all of RDD's assets, as awarded by the trial court, *all* of the assets must necessarily have been obtained for Remus through plaintiff's legal services. There is no evidence to show that occurred. There is no dispute that plaintiff provided Remus valuable legal services or that it assisted Remus and EDS in procuring the environmental licenses and permits necessary to operate the hazardous waste facility. To the extent that the licenses and permits could be construed as a judgment or fund resulting from plaintiff's services (*Starkey*, 116 Mich App at 644) then, its attorney's lien would attach solely to the licenses and permits that its services helped secure.[1]

Plaintiff contends that its services resulted in much more for Remus--an ability to proceed with the project. However, it is also undisputed that PFRS invested over $40 million in the project, also arguably providing Remus with an ability to proceed with the project. Indeed, the evidence indicates that some of plaintiff's fees were paid out of monies loaned by PFRS. PFRS then created RDD, a holding company, simply to receive and hold Remus's assets (which served as security for the PFRS loans) when Remus did not repay the loans, and it was apparent that PFRS neither had the funds to continue operations or to remedy existing environmental concerns, to ensure that the project was not taken over by the DEQ. Others contributed to the project as well, and, it could be argued, played an integral part in assuring that the project could proceed. Plaintiff cannot claim that its legal services *resulted* in all of Remus's assets coming into existence when it was but one of several contributing factors to the project's creation, not the least of which was the initial and continuing funding provided by PFRS. The trial court thus abused its discretion in awarding plaintiff an attorney's lien on all of RDD's assets.

While plaintiff claims that it need not have plead a separate equitable lien claim because an attorney's charging lien *is* an equitable lien, plaintiff is only partially correct. An attorney's charging lien is a specific *species* of equitable lien unique to attorney's alone. And, that specific

[1] As indicated by plaintiff, the transfer of the permits to RDD effectively terminated the permits. Plaintiff thus has nothing to which it could attach its attorney lien in any event.

and unique species is what plaintiff pleaded in its complaint. An equitable lien, on the other hand, is defined as that which "arises from an agreement that both identifies property and shows an intention that the property will be security for an obligation." *In re Moukalled Estate*, 269 Mich App 708, 719; 714 NW2d 400 (2006). Thus, it is different than an attorney's charging lien because it (1) is not limited to attorneys and (2) does not create a lien on a judgment, settlement or money recovered as a result of legal services. In addition, where there is no written contract, an equitable lien will be established only where, through the relations of the parties, there is a clear intent to use an identifiable piece of property as security for a debt. *Id*. Had plaintiff also sought an equitable lien premised on basic equitable principles as defined, it could have pled the same. It did not. Plaintiff did not plead that it had an agreement with Remus which identified property and showed an intention that the property would be security for an obligation. Its agreement with Remus was purely for monetary fees that would be paid in cash when a specified event occurred. Having not pleaded a claim for an equitable lien, plaintiff was not entitled to the same.

It is true that "the granting of equitable relief is ordinarily a matter of grace, and whether a court of equity will exercise its jurisdiction, and the propriety of affording equitable relief, rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case." *Tkachik v Mandeville*, 487 Mich 38, 45; 790 NW2d 260, 264 (2010). However, in this matter, the trial court abused its discretion in granting plaintiff a lien on all of RDD's assets where there is no binding legal support for such an award, and where there was no evidence that all of RDD's assets were obtained for Remus and/or EDS through plaintiff's legal services. Although plaintiff contends that a money judgment in its favor was proper under the circumstances, the trial court clearly awarded a money judgment in its favor only with respect to plaintiff's successor liability claim. A money judgment was thus not awarded on the attorney lien claim and would not have been affirmed, having not been supported by the record.

RDD next claims that the trial court erred in granting summary disposition in plaintiff's favor on its claim of successor liability. We agree.

In granting summary disposition in favor of plaintiff on this claim, the trial court stated, ". . . in this case, all the assets of the first case were transferred to the second company. And therefore under Michigan law, the liabilities are transferred with the assets." This is not a correct statement of Michigan law. Instead, "[t]he corporate law concept of successor liability provides that a corporation that merely purchases the assets of another corporation is not generally responsible for the liabilities of the selling corporation." *Jeffrey v Rapid Am Corp*, 448 Mich 178, 189; 529 NW2d 644, 651 (1995).

Whether a successor corporation assumes the liabilities of the predecessor corporation specifically depends upon the nature of the transaction. *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 702; 597 NW2d 506 (1999). Where stock is exchanged as consideration, the successor corporation is generally liable for the predecessor corporation's liabilities. *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 96-97; 684 NW2d 296 (2004). If the successor purchases assets for cash, however, the successor corporation assumes its predecessor's liabilities only

> (1) where there is an express or implied assumption of liability; (2) where the transaction amounts to a consolidation or merger; (3) where the transaction was fraudulent; (4) where some of the elements of a purchase in good faith were lacking, or where the transfer was without consideration and the creditors of the transferor were not provided for; or (5) where the transferee corporation was a mere continuation or reincarnation of the old corporation. *Id*.

Notably, the situation before the trial court was not one in which a corporation, RDD, purchased the assets of another corporation (Remus and EDS). Instead, it was a situation in which RDD, as a creditor, foreclosed upon the security of its debtors, Remus and EDS. Thus, it is doubtful whether the principles of successor liability were applicable at all. Assuming, without deciding that such principles were applicable, it is undisputed that stock was not exchanged as consideration for RDD's acquisition of Remus and EDS's assets in the project. Thus, in order for RDD to assume Remus and EDS's liabilities, one of the five exceptions set forth in *Oakwood Hosp*, 471 Mich at 96-97 must be established.

Plaintiff argues that two of the five exceptions applied: that some of the elements of a purchase in good faith were lacking, or where the transfer was without consideration and the creditors of the transferor were not provided for and that the transaction was fraudulent. However, the trial court made no finding of lack of consideration or of a fraudulent transfer. The trial court simply stated that it "would be in effect going through bankruptcy and just changing the name of their company if they are transferring all of the assets" and nothing more. However, the deposition testimony of EDS's president, Douglas Wicklund, reveals that he did not want to transfer the assets of the company, but that the facility had already been shut down and was no longer receiving any incoming hazardous waste, and had no money for operating expenses or to pay its bills. Evidence further established that the facility had violated environmental regulations and required significant further monetary investment to avoid the imposition of penalties and fees. When the facility was taken over by RDD, PFRS invested over $5 million more in the still-inoperative facility to ensure that the facility was not fined for environmental violations. Thus, what took place was not a voluntary transfer of assets similar to a bankruptcy proceeding or name change.

Again, due to the precise nature of the proceedings, we are unconvinced that principles of successor liability are applicable in this matter. Assuming, without deciding that they are applicable, the trial court misstated the relevant law concerning successor liability and failed to find that any of the five exceptions necessary to find that RDD assumed Remus and EDS's liabilities were met. The trial court thus erred in granting summary disposition in favor of plaintiff and against RDD on plaintiff's successor liability claim and in entering a judgment in plaintiff's favor on that claim.

On cross-appeal, plaintiff asserts that the trial court erred in granting summary disposition in favor of PFRS on plaintiff's claims of partnership liability and joint venture

liability and in favor of defendants PFRS and RDD,[2] on plaintiff's fraudulent transfer claim. We disagree in all respects.

A "partnership" is defined at MCL 449.6(1) as " . . . an association of 2 or more persons . . . to carry on as co-owners a business for profit . . . ." There need be no subjective intent to form the legal relationship of a partnership; the parties must only associate themselves to "carry on" as co-owners of a business for profit. *Byker v Mannes*, 465 Mich 637, 646; 641 NW2d 210 (2002). Thus, the focus, when determining the existence of a partnership, is whether the parties intended to and did carry on as co-owners in their business arrangements. *Id*. at 653.

MCL 449.7 provides factors to consider when determining whether a partnership was created:

> In determining whether a partnership exists, these rules shall apply:
>
> (1) Except as provided by [MCL 449.16,] persons who are not partners as to each other are not partners as to third persons;
>
> (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property;
>
> (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived;
>
> (4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
>
> (a) As a debt by installments or otherwise,
>
> (b) As wages of an employe [sic] or rent to a landlord,
>
> (c) As an annuity to a widow or representative of a deceased partner,
>
> (d) As interest on a loan, though the amount of payment vary with the profits of the business,
>
> (e) As the consideration for the sale of the good-will of a business or other property by installments or otherwise.

[2] Plaintiff asserts that the trial court erroneously granted summary disposition in favor of defendants Ronald Zajec, P.C. and F. Logan Davidson, P.C. on the fraudulent transfer claim. However, plaintiff asserted this claim only against EDS, Remus, Romulus, PFRS, and RDD.

Plaintiff asserts that PFRS was assigned a 7.447 royalty interest in annual gross receipts and an additional 1% in equity interest in net income (from 12% to 13%) after repayment of principal and interest for its expanding funding role, which serves as prima facie evidence that it was a partner in the project. The sharing of gross receipts, of itself, however, does not evidence a partnership pursuant to MCL 449.7(3). And the percentage in equity interest in net income was specified as additional payment for PFRS's expanding funding role. Thus, it served as additional consideration for PFRS's funding.

In addition, Douglas Wicklund, president of EDS, testified that the primary concern of PFRS was to "make sure that, as a result of their investment in the project, that they didn't take on any liability for the project . . . and one—the best way to accomplish that was they would not have any control over management over the project. That was the intent all along." Wicklund further testified that PFRS was simply a passive investor in the project and had no involvement in the major decisions concerning the project. While PFRS did determine whether to loan additional monies to EDS and Remus based upon budget proposals and would authorize budgets, that was, according to Wicklund, the extent of PFRS's involvement. The evidence thus indicates that PFRS was, as portrayed by Wicklund a significant lender which approved expenditures on budgets submitted to it by its lendee. Plaintiff did not establish that PFRS was more than an investor or creditor in the project and the trial court properly granted summary disposition in PFRS's favor on plaintiff's partnership claim.

A joint venture or joint "adventure" is defined as "an association to carry out a single business enterprise for a profit." *Berger v Mead*, 127 Mich App 209, 214; 338 NW2d 919 (1983). As the Berger Court further explained at 214–215, quoting *Meyers v Robb*, 82 Mich App 549, 557; 267 NW2d 450 (1978):

> A joint venture has six elements:
>
> (a) an agreement indicating an intention to undertake a joint venture;
>
> (b) a joint undertaking of
>
> (c) a single project for profit;
>
> (d) a sharing of profits as well as losses;
>
> (e) contribution of skills or property by the parties;
>
> (f) community interest and control over the subject matter of the enterprise.

Here, plaintiff has not established that PFRS entered into an agreement with EDS and Remus to enter into a joint venture. At most, PFRS agreed to loan EDS and Remus monies for a specific project and PFRS secured the loans with mortgages. Plaintiff has also not alleged or established that PFRS agreed to share in the project's losses, or that PFRS contributed skills or property to the project. As indicated above, unrefuted testimony by Wicklund further indicates that PFRS

had no control over the subject matter of the enterprise. The trial court thus did not err in granting summary disposition in favor of PFRS on the claim of joint venture.

With respect to the fraudulent transfer claim, plaintiff asserts that the trial court erroneously dismissed its claim based upon violations of the Uniform Fraudulent Transfer Act (UFTA), specifically MCL 566.34(1) and 566.35(1). We disagree.

The UFTA permits a creditor to seek various remedies including avoidance, attachment and injunctive relief when a fraudulent conveyance has been made by a debtor. MCL 566.37(1). MCL 566.34 provides:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor.
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:
>
> (*i*) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
>
> (*ii*) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.
>
> (2) In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether 1 or more of the following occurred:
>
> (a) The transfer or obligation was to an insider.
>
> (b) The debtor retained possession or control of the property transferred after the transfer.
>
> (c) The transfer or obligation was disclosed or concealed.
>
> (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
>
> (e) The transfer was of substantially all of the debtor's assets.
>
> (f) The debtor absconded.
>
> (g) The debtor removed or concealed assets.

> (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
>
> (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
>
> (j) The transfer occurred shortly before or shortly after a substantial debt was incurred.
>
> (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

The UFTA defines a transfer as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." MCL 566.31(l).

Plaintiff alleged in its first amended complaint that Remus and EDS transferred their assets and RDD received the same, with the intent to hinder, delay, or defraud plaintiff by avoiding payment to it. Plaintiff asserts that several of the "badges of fraud" set forth in MCL 566.34(2) are present to support its claim of a fraudulent transfer. First, plaintiff claims that the transfer was to an insider under MCL 566.34(2)(a), asserting that because PFRS was a partner and joint venture it was an insider. This Court having determined that PFRS was neither a partner nor joint venturer, this argument fails.

Plaintiff next claims that the transfer was of substantially all of the debtor's assets pursuant to MCL 566.34(2)(e). This is correct.

Plaintiff next claims that the value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred, as set forth in MCL 566.34(2)(h), as neither PFRS nor RDD paid the project for all of the project's assets. However, it is also undisputed that PFRS held a mortgage on the assets for over $40 million in loans it had made on the project and that payment was not made on the loans. Thus, it is questionable what, if anything, would have been owed by PFRS to the project.

Plaintiff further asserts that the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred as set forth in MCL 566.34(i). While plaintiff asserts that the project was insolvent immediately after the transfer was made, testimony from Wicklund establishes that the project had already closed and was unable to pay its bills prior to the transfer of assets. EDS had, in fact, borrowed money from PFRS on prior occasions just to keep the project going.

Plaintiff also claims that the transfer occurred shortly before or shortly after a substantial debt was incurred as set forth in MCL 566.34(j). Plaintiff claims that the November 2006 transfer of assets occurred approximately one month "after the project acknowledged and

reaffirmed its more than $1.6 million debt" to plaintiff. Notwithstanding the October 2006 acknowledgement and reaffirmation, Remus and EDS's debt to plaintiff had been *incurred* long before the November 2006 transfer. The parties' fee agreement provided that plaintiff's fees were due and payable upon the completion of the project and the commencement of commercial operations, which occurred in December 2005. Thus, the substantial debt was incurred, at the latest, in December 2005 and not shortly before or shortly after the November 2006 transfer.

Thus, the only factor that plaintiff has substantially established in support of a fraudulent transfer under MCL 566.34 is a transfer of substantially all of the debtor's assets. What plaintiff continually glosses over, however, is that the "badges of fraud" under subsection (2) only come into play to establish that the *debtor* "made the transfer or incurred the obligation . . . [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." Thus, plaintiff must establish that Remus, as debtor, transferred all of its assets with actual intent to hinder, delay, or defraud plaintiff. Plaintiff has failed to genuinely allege this fact, let alone provide any evidence of the same. By all accounts, Remus did not want to transfer the assets at all. This was not a voluntary transfer of assets on the debtor's part but was a foreclosure upon the assets by a creditor. Plaintiff has provided no evidence suggesting that the transfer was accomplished on Remus part with the intent to hinder, delay or defraud plaintiff.

Plaintiff further alleges that the transfer violated MCL 566.35. That statute provides:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.
>
> (2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

Although the project received no value for the assets, the assets served as security for the $40 million in loans and were foreclosed upon as the collateral for the unpaid loans. It is unclear why plaintiff believes payment would be made by a foreclosing party when foreclosing upon security. And, as previously indicated, there is no indication that PFRS or RDD was an insider and Wicklund's testimony established that the project was insolvent prior to the transfer of the assets. The trial court did not err in dismissing the UFTA claims.

The trial court similarly did not err in dismissing the conspiracy to commit a fraudulent conveyance claim. "A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003)(citation omitted). For a civil conspiracy claim to succeed, it is necessary to prove a separate, actionable tort. *Id.*

In this matter, plaintiff's alleged separate, actionable tort was fraudulent conveyance (violation of UFTA). As previously discussed, however, plaintiff failed to establish a fraudulent conveyance. As a result, the conspiracy claim must also fail.

We reverse the trial court's grant of summary disposition in favor of plaintiff and against RDD on plaintiff's claim of successor liability and on the claim of attorney's lien. We thus vacate the judgment granting an attorney's lien on all of RDD's assets as well as the money judgment entered in plaintiff's favor and against RDD. We remand for entry of summary disposition in favor of RDD on these two claims. We affirm the trial court's summary disposition rulings on all other issues. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Jane M. Beckering